JD–69–16
New Orleans, LA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EKHAYA YOUTH PROJECT, INC.

and

Cases 15–CA–155131
15–CA–162082

DALANA ZIPPORAH MINOR
An Individual

Amiel Provosty, Esq.,
for the General Counsel.
Michael J. Laughlin, Esq., Metairie, Louisiana
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in New Orleans, Louisiana on May 2 and 3, 2016. Dalana Zipporah Minor[1] filed the initial charges giving rise to this case on June 29, and October 16, 2015. The June 29 charge alleged that Respondent put her on administrative leave on June 18, 2015 and then discharged her on June 22 in retaliation for protected activities. Subsequent charges and amended charges repeated these allegations and added an allegation that Respondent maintained rules that violated the Act in its employee handbook and corporate compliance program, and several other Section 8(a)(1) allegations.

The General Counsel issued a complaint on October 30, 2015 and amended complaints on January 27 and April 18, 2016, 2 weeks before the hearing. At the start of the May 2, 2016 hearing, the General Counsel moved to amend the complaint to allege that Respondent violated the Act by terminating Nicholas Davis. The termination of Davis was not mentioned in any unfair labor practice charge. Respondent terminated Davis on the same day as it terminated Minor, for engaging in some of the same conduct as Minor.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] Minor also goes by or has gone by the names Zipporah Legard, and Dalana Patrece Minor.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, which has its main office in New Orleans, is a social service agency. It provides mental health services to youth and their families throughout the State of Louisiana. It annually derives gross revenues in excess of $500,000. Respondent purchases and receives at its New Orleans facilities goods valued in excess of $5,000 directly from outside of Louisiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent hired Nicholas Davis on May 14, 2015 as Executive Assistant to its Chief Executive Officer, Darrin Harris. Harris terminated Davis on June 22, about six weeks later.[2]

Respondent hired Dalana Zipporah Minor on May 13, 2015 as central office administrator at its headquarters' office on Bienville Street in New Orleans.[3] Minor reported to Chief Operating Officer Vanshawn Branch. He suspended Minor on June 18 and then terminated her on June 22, the same day CEO Harris fired Davis. Minor's job duties included responding to correspondence and coordinating with Respondent's vendors. Respondent's central office in which Minor worked was a converted residence. She shared an office with quality assurance specialists Yvette Frasier and Stephanie McGrew,[4] and Kendra Graves, Respondent's payroll processor.

At 1:20 a.m. on June 18, 2015, COO Branch set the following email to employees Minor, McGrew, Frasier and Graves:

> Please do not close the door to the Corporate Compliance Office. No meetings should be held in the Corporate Compliance Office without prior authorization from your immediate Supervisor. Any meeting held by Ekhaya Youth Project should have a sign-in sheet and meeting minutes. This Office door should never be closed by any of the individuals seated in the Corporate Compliance Office or any other office unless the Manager of the department orders a meeting.

G.C. Exh. 4.

Branch apparently sent this email after learning that Stephanie McGrew had closed the door to the office after Kendra Graves began shouting on the previous day. Graves became upset when Minor showed her Minor's job description, which indicated that Minor would be supervising Graves, Tr. 161-164.

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[2] Davis testified that he was hired on about April 10, 2015. Respondent's termination notice lists May 14 as his hire date. Moreover, Davis testified that he met Minor at an employee orientation. Thus, I conclude they were hired at about the same time in May.

[3] Respondent's employees were nominally employed by Canal Human Resources.

[4] McGrew was terminated on June 22, 2015, the same day Davis and Minor were terminated.

At 3:33 a.m., Branch sent another email to Ekhaya staff:

> Any emails forwarded and replied to by any Central Office Staff member must be carbon copied to the COO. Please be sure to follow the policy and procedure listed in this email. This policy is effective Thursday, June 18, 2015. In the event the email did not include the COO, please be sure to include the COO when replying. Responsiveness is required during the hours of 9am - 6pm and the promise to communicate will be exemplified via operation of the policy stated in this email.[5]

Even prior to this email, Respondent had the ability to access all emails sent and received by employees using its email system. Vanshawn Branch testified that he issued this email policy to assure that assigned tasks were completed and completed properly, Tr. 382.

On June 18, 2015, Respondent's Chief Operating Officer, Vanshawn Branch and corporate compliance officer Nora Rowan were conducting staff training at Respondent's office in Houma, Louisiana. Minor was at her desk at the Bienville office and Davis was accompanying CEO Harris on a trip to Monroe, Louisiana. Between 12:25 p.m. and 1:09 p.m. Minor and Nicholas Davis exchanged the following text messages, G.C. Exh. 10.5-10.11:

Minor: R u n the loop about what's going down here?

Davis: A little I heard they had an argument[6]

Davis: What's up

Minor: We have 2 have a surprise staff meeting on Monday. I think Mr. Branch hates Yvette. I've been told my position is redundant by staff bc they don't need (want) 2b supervised. Total clusterfuck.

Minor: I just want 2 order supplies, make the office look cool, have everything run like a proper business. The latter goes against my anarchist principles.

Davis: Why does Mr. Branch hate Yvette

Davis: I love her

Davis: Ask her to text me

Minor: No idea. I don't know anything except I just need everyone 2 chill and get along.

[5] Complaint paragraph 8(a) alleges that this email violates Section 8(a)(1) of the Act.

[6] According to Minor this refers to an argument between Stephanie McGrew and Vanessa Summler, Respondent's Claims Manager. The argument apparently related to Yvette Frasier's documentation of her lunch break.

Davis: They check emails so I don't want to give her my number or talk via email with u all

Minor: Omgg despite the fact they can check emails, they have implemented this new policy where we have CC Mr. Branch on EVERYTHING.

Davis: I really don't like him, he doesn't know his job forgets to do stuff assigned to him then wants to walk around like he's a big shit

Davis: He attempts to be little people who don't have a degree an he doesn't even have one

Davis: I believe he doesn't like Yvette bc she's pretty, intelligent and a woman everything he want to be

Minor: I dunno. Sometimes he bugs me but he's not going anywhere given the circumstances. I think Yvette challenging him is a poor career move if she wants 2 keep working with them. But I really want 2 stay out of it but I think I'm trapped n it so oh well.

Davis: To challenge a supervisor when they are wrong is not wrong, he just feels because of his title he is entitled to be automatically right

Minor: Yeah, but u gota b way sneaky about it. It's like a got damn Disney villain scenario. "Sire perhaps we could try capturing Aladdin by…" "Cease your chatter, fool!"

Davis: I see what your saying.

Shortly after this exchange Minor laid her head down on her desk and closed her eyes. After a while Vanessa Summler entered the office and took a picture of Minor. Summler testified that Minor was asleep. Minor testified that she was not.

According to Minor, Summler asked her why she was not answering the phones. Minor told her she was on break. Summler was angry and sent Minor an email at 3:09. In this email, Summler informed Minor that it was her responsibility to answer all incoming telephone calls and maintain a log of them. Summler reported to Branch that she saw Minor sleeping at her desk.

Sometime in the afternoon of June 18, Branch left Houma. On his way to New Orleans, Kendra Graves called him and told him that Minor and Davis were having a conversation about his sexual orientation that was derogatory. Graves mentioned that Minor and Davis had exchanged text messages pertaining to this subject, Tr. 86, 371. Branch directed Graves to send him an email about the conversations between Minor and Davis.

At 4:05 p.m., Kendra Graves sent the following email to Branch:

> There seems to be some unprofessional rapport happening between Zipporah Minor and Nicholas Davis. Their conversations are regarding a romantic relationship between Mr. Branch and Mr. Harris. They talk back and forth about Mr. Branch only having his position based on this relationship with Mr. Harris because he is unqualified. There was some talk of Mr. Branch wearing dresses, and being uneducated. Zipporah also seems to find humor in the fact that Mr. Branch "doesn't like Yvette." (Yvette Frazier) Zipporah has also been asking individuals around the Central Office if they knew anything about the romantic relationship between Mr. Harris and Mr. Branch.

Employer Exhibit 7.

Graves did not testify in this proceeding. However, in this proceeding, Minor did not deny discussing the texts with coworkers or gossiping about Branch's sexuality. I thus find that the content of Graves' email is accurate.

Branch testified that while he was driving from Houma to New Orleans, he received several other phone calls complaining about Minor. Branch testified that Yvette Frasier complained to him that Minor was discussing Frasier's salary publically.[7] Branch testified that Minor was assigned to assist with payroll processing and as a result had access to employees' personnel records.

When Branch arrived at the New Orleans office he summoned Minor to a meeting. Sumler was also present. The first thing he did was to ask Minor about her conversation that day with Davis, Tr. 176. Branch then asked to see Minor's cellphone. After initially resisting, Minor showed Branch the text messages. Branch asked Minor to forward the texts to him; she refused.

Branch scrolled through the text messages and discussed them with Minor. At some point during the meeting, Minor and Branch had a discussion about Minor discussing other employees' salaries, Tr. 248. The record is very unclear as to what was said. Branch's version is that Minor was assigned to assist with the preparation of Respondent's payroll. He testified that he received a complaint from Frasier that Minor was discussing her salary publically in the office. Further, Branch testified that he told Minor that she was not to disclose any person's pay rate. Minor testified that she denied discussing any employee's salary but her own. Tr. 179-80.

Branch ended the meeting by telling Minor to go to her desk, pack up her belongings and leave the premises. Otherwise, he threatened to call the police. After she left the building, Minor forwarded the text messages between her and Davis to Branch.

At 8:23 p.m. Branch sent a text message to Minor informing her that she was on administrative leave pending further investigation. He also texted her that she should not talk to the other staff members because it might affect the investigation.

[7] Neither the General Counsel nor Respondent asked Frasier about this when she testified.

Respondent's investigation

Nora Rowan, Respondent's corporate compliance officer conducted an investigation of Minor's conduct. She did not interview Minor or Graves, but spoke with Branch, Frasier and Sumler. She did not take written statements from any of these people until after Minor filed her initial unfair labor practice charge. Rowan also reviewed the June 18 text messages between Minor and Davis and discussed them with Branch.[8]

Respondent terminates Minor

On June 22, 2015, Respondent sent Minor a letter terminating her employment and a disciplinary documentation notice, G.C. Exh. 9.

The letter sets forth the portions of the employee handbook and corporate compliance program which were allegedly violated by Minor. The disciplinary documentation notice states the specific reasons for Minor's termination as follows:

> Incident 1: Ms. Minor was witnessed sleeping at her desk by multiple employees.
> Incident 2: Ms. Minor was regularly engaged in loud non-work related conversation. She was verbally warned and advised to stop participating in such conversation by her Supervisor, Mr. VanShawn Branch. The behavior did not cease as advised.
> Incident 3: It was brought to the attention of the Supervisor, Mr. Branch that Ms. Minor had engaged in several inappropriate conversations with fellow employees, particularly Mr. Nicholas Davis, Executive Assistant to the CEO. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors' professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal like/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered an inappropriate familiarity among staff members and is strictly prohibited.

Respondent terminates Davis

Nicholas Davis reported to work on June 22, 2015 at the Bienville Street office. A number of employees had been told to report to this location for a meeting. CEO Darrin Harris addressed the employees. Harris threatened to sue any employees who slandered him. At some point Harris met individually with Davis. Harris told Davis that Davis was discussing Harris' sexual orientation and that this was not a subject for discussion by employees. Although, it is not clear from the record, I infer that Harris fired Davis on the spot.[9]

[8] The General Counsel's brief states that Ms. Rowan did not *possess* the text messages, Br. at p. 29. However, she saw them, reviewed the content and discussed them with Branch, Tr. 133.

[9] Harris did not testify in this proceeding.

The discipline documentation notice attached to Davis' termination letter lists the following reasons for his discharge:

> Incident 1: After receiving Mr. Davis' completed background check, it was determined that he had pending charges on his record. Mr. Davis was advised by the CEO, Darrin Harris, to produce a personal explanation and accompanying court documents to maintain compliance with OBHS/CSoC requirements. He did not produce these documents, disobeying a direct request form his Supervisor.[10]
>
> Incident 2: It was brought to attention of the UMT that Mr. Davis had engaged in several in appropriate conversations with fellow employees, particularly Ms. Zipporah Minor, Central Office Administrator. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal likes/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered an inappropriate familiarity among staff members and is strictly prohibited. Mr. Davis was also specifically advised not to cultivate friendships with other employees to maintain the strictest standards of privacy and confidentiality of the CEO, which he deliberately disobeyed.

Section 8(a)(1) violations arising out of Vanshawn Branch's meeting with Minor on June 18, 2015 and the termination notices sent to Minor and Davis (complaint paragraphs 5(a)-(h).

Paragraph 5(a) & (b): The complaint alleges that Respondent, by Vanshawn Branch, violated the Act by telling employees that they were prohibited from talking to each other and other staff. The General Counsel's brief, however, focuses on Branch's text to Minor on the evening of June 18. Branch informed Minor that she was temporarily on administrative leave pending further investigation. He then wrote, "Please do not have any conversation with staff or it could possibly effect the outcome of the investigation," G.C. Exh. 8.

In *Caesar's Palace,* 336 NLRB 271, 272 (2001) the Board held that the employer did not violate Section 8(a)(1) by instructing employees not to discuss an ongoing drug investigation. It observed that employees have a Section 7 right to discuss discipline or disciplinary investigations. However, it found that Caesar's established a substantial and legitimate business justification which outweighed its infringement on employees' rights. The Board in footnote 5 made it clear that it is the Respondent's burden to establish a legitimate and substantial business justification.

In *Hyundai America Shipping Agency, Inc.* 357 NLRB 860 (2011) the Board found the employer violated Section 8(a)(1) by promulgating, maintaining and enforcing an oral rule

[10] There was a dispute between Davis and Respondent as to what sort of documentation he had to provide Respondent regarding a pending criminal charge. There is no need to go into this dispute in any detail since there is no relationship to any activity protected by the Act.

prohibiting employees from discussing with other persons any matters under investigation by its human resources department. This rule was a blanket prohibition, applying to all matters regardless of the circumstances. The employer's rule in *Boeing Co.,* 362 NLRB No. 195 (2015), cited by the General Counsel, was similarly broad.

What the Board has not clearly articulated is the nature of the employer's burden in such cases as this in which an employer is undertaking an investigation of specific employee misconduct to determine whether any adverse personnel action is to be taken.
I find that Branch's explanation that conversations with other employees could possibly affect the outcome of the investigation satisfies Respondent's burden. Thus, I dismiss complaint paragraph 5(a) and paragraph (b) that allege that Branch's text constituted an illegal threat..

In *Caesar's Palace,* an employer witness testified that it never explained the purpose of the confidentiality instruction to the employees during the investigation, 336 NLRB at 273. The Board appears to have inferred from the circumstances of the investigation that the employer had a legitimate and substantial justification for its confidentiality instructions. I believe this could be inferred in many investigations in which the dangers of evidence being destroyed, fabricated, and witness intimidation are obvious. In this vein I would note the Rule 615 of the Federal Rules of Evidence, in requiring a judge to order the sequestration of witnesses upon the request of any party, is a tacit recognition of this danger.

Complaint paragraphs 5(c)-(h)

These complaint allegations are based on the termination letters and disciplinary documentation sent to Minor and Davis on June 22, specifically the following reasons given for their terminations:

> several inappropriate conversations with fellow employees, particularly Mr. Nicholas Davis, Executive Assistant to the CEO. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors' professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal like/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered an inappropriate familiarity among staff members and is strictly prohibited.

Minor and Davis both understood that they were terminated or going to be terminated because of their text message exchange on June 18, G.C. 21. Despite the fact that I find that these texts were not protected, the language of the termination letters in suggesting that they were terminated due to gossip and misinformation about employees/supervisors' salaries, discussing the work abilities of supervisors, discussing the work abilities of fellow employees, discussing whether employees should receive promotions and mistreatment of an employee, violates Section 8(a)(1). They certainly were entitled to talk about employees' and supervisors' salaries and other terms and conditions of employment unless they were maliciously spreading information they knew to be false. *Joliff v. NLRB ,* 513 F. 3d 600 (6th Cir. 2008). Thus, I find Respondent violated Section 8(a)(1) as alleged in paragraph 5(c, d, e, f and h).

On the other hand, I dismiss paragraph 5(g) which alleges that Respondent informed its employees that they were being discharged for discussing the unfairness of the Continued Communication Policy with other employees. The Continued Communication Policy was not mentioned in the disciplinary documentation. There was no reason for Minor or Davis to conclude from the documentation they received that Minor's text which may have inferentially criticized that policy had anything to do with their terminations, or that Respondent was prohibiting discussion of that policy.

Allegedly Violative Rules

Complaint paragraph 6 alleges that Respondent maintained a rule prohibiting employees from discussing salaries. Respondent maintained no such rule. The General Counsel relies on the conversation between Branch and Minor on July 18 to support this allegation. As stated earlier in this decision, I find that Branch was discussing salary information that Minor became privy to in the course of her official duties and disseminated without the consent of other employees. I conclude that Branch did not violate the Act in prohibiting Minor from doing so, *Ashville School, Inc.,* 347 NLRB 877, fn. 1 (2006); *Clinton Corn Processing Company,* 253 NLRB 622 (1980).[11]

The General Counsel alleges in complaint paragraph 7 that the following rules set forth in Respondent's handbook and corporate compliance program violative Section 8(a)(1) of the Act:

> (a) Subject: Conduct and Work Rules
>
> To ensure orderly operations and provide the best possible work environment, Ekhaya Youth Project expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are some examples of infractions of rules of conduct which may result in disciplinary action, up to and including termination of employment:
>
> 6. Boisterous or disruptive activity.
>
> (b) Subject: Professional Ethics
>
> Ekhaya Youth Project staff shall maintain professional ethics and standards at all times and will adhere to the highest moral standards while on duty working. Recognize that the youth and families may have suffered a dramatic emotional and/or physical trauma. Ekhaya Youth Project staff are their closest contact for emotional and physical support. Staff must meet their needs for attention and/or assistance without fail, if therapeutic goals are to be attained.

[11] These cases are discussed in more detail below with regard to the issue of whether Minor engaged in any protected concerted activity.

8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function).

11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.

13. Staff will protect the privacy of other staff at all times.

14. Staff will not give information of any nature about other staff to any unauthorized individual…

(c) Subject: Non-Disclosure

The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project such confidential information includes, but is not limited to, the following examples:

• • •

3. Financial information

4. Personnel information

• • •

(d) Subject: Disciplinary Action/Employee Performance Improvement Process:

B. Grounds for Discipline

a. The following reasons constitute grounds for dismissal:
ix. The Employee has engaged in conduct on or off duty that is of such a nature it causes discredit to the agency.

(e) Ekhaya Youth Project Corporate Compliance Program...

K. Personal and Confidential Information:

• Ekhaya. Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families...

As noted on page 3 of this decision complaint paragraph 8(a) alleges that Respondent violated the Act by requiring employees to copy Branch on every email forwarded or replied to by any staff member. Paragraph 8(b) alleges that Respondent also violated the Act on December 18, 2015, when Branch sent the following email to Ekhaya staff:

The performance of your duties as an EYP Corporate Office employee which is conducted by e-mail must be conducted using EYP's e-mail system (ekhayafso.org and/or your ekhaya gmail account [first initial, last

> name eyp@gmail.com]) and not your personal e-mail. All e-mail which is sent by you and/or which is replied to or forwarded by you using EYP's e-mail system must be copied to the COO; in the event that an original email is received by you on EYP's e-mail system and the COO is not copied, you must forward a copy of that e-mail to the COO and copy the COO with any response on EYP's e-mail system. Responsiveness is required during office hours of 9:00 AM — 6:00 PM and the promise to communicate will be exemplified via operations of the policy stated in this email.

Analysis[12]

The heart of this case is the General Counsel's contention that Respondent violated the Act in terminating Minor and Davis. The rest of the case, while not unimportant, is "collateral damage" emanating from the terminations.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* ... (Emphasis added)"

In *(Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

However, not every conversation that touches upon wages, hours and working conditions constitutes protected concerted activity. The conversation must be part of an effort to initiate or promote concerted action about such conditions.

> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted activity, and if it looks forward to no action at all, it is more than likely to be mere 'griping."

Mushroom Transportation Company v. NLRB, 330 F. 2d 683 (3d Cir. 1964).

[12] My analysis of the allegations in complaint paragraph 5 is set forth earlier in this decision. I will not repeat it.

I find that the terminations of Minor and Davis did not violate the Act.[13] Although Respondent's investigation and the termination documents "muddy the waters," I find that the two were terminated for the text messages of June 18 and Minor's subsequent discussion of their content with fellow employees.[14] The conduct for which they were terminated was not protected. Assuming that some of this conduct was protected, they sacrificed that protection and demonstrated that they were "unfit for further service," either under the standard set forth in *Atlantic Steel Co.,* 245 NLRB 814 (1979) or the standard set forth in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953) *Linn v. Plant Guards Local 114,* 383 NLRB 53 (1966).

In reaching these conclusions, I rely significantly on the Board's decision in *Lutheran Social Service of Minnesota,* 250 NLRB 35 (1980) dismissing the General Counsel's complaint in circumstances somewhat similar to the instant case. In doing so, I also rely in large part on the conclusions of Administrative Law Judge Bernard Ries, which were adopted by the Board.

With regard to the alleged discriminatees in that case, Judge Ries observed:

> While the conduct of Johnson and Schaefbauer was loosely concerted, it is hard to say that it was directed toward any particular objective. …they made no effort to invite the other employees into some informal coalition; they formulated no agenda; they filed no grievances; and they made no demands. What they did, essentially was to complain, criticize and carp from, as it were, the sidelines.
>
> The statute protects protests in which there inheres action or the possibility of action.
>
> …such conduct, though jointly engaged in by two or more individuals, really amounts to no more than "mere griping," which the Act does not seek to protect.

Id. at page 41.

General complaints about the competence of upper level managers are normally unprotected in that they do not relate to wages, hours and other terms and conditions of employment, *Retail Clerks Union, Local 770, Retails Clerks International Association,* 208 NLRB 356, 357 (1974). Davis' text messages and Minor's subsequent discussion with fellow employees provides no reason to depart from the normal rule. They had no other purpose than to demean Vanshawn Branch.

The General Counsel's reliance on *Salon/Spa at Boro, Inc.,* 356 NLRB 444 (2010) is misplaced. In that case employees voiced concern about how management treated other

[13] Because I dismiss the complaint allegation that Respondent violated the Act in terminating Davis, I will not address Respondent's contention that this allegation is barred by Section 10(b) of the Act.

[14] This case is somewhat unusual in that the termination documents give pretextual reasons for the terminations that could be violative. However, Davis' discussion with CEO Harris and Minor's with Branch makes it abundantly clear that both Davis and Minor were fired for the substance of the text messages and Minor's discussion with her coworkers afterwards of the relationship between Harris and Branch.

employees. However, it was clear that their action was a prelude to group action. This is not the case with regard to Minor and Davis' expressed concerns with regard to Branch's attitude towards Yvette Frasier.

Thus, to be protected by Section 7, conversation between two or more employees about wages, hours and working conditions must be seeking to initiate, induce or prepare for group action, *Triple Play Sports Bar & Grille,* 361 NLRB No. 31 (2014), slip opinion at p. 3. There is no basis for concluding that the text message exchange between Davis and Minor on June 18, 2015 meets this standard. Minor, as shown by Kendra Graves' email to Vanshawn Branch, discussed these texts or showed them to other co-workers. There is nothing protected in her doing so. Their only objective was to disparage Branch.

Davis did not engage in any other activities that could be deemed protected by the Act. Even assuming that he and/or Minor engaged in protected activity, I find they forfeited those protections. The texts and Minor's discussion afterwards were flagrantly disloyal and wholly incommensurate with any grievances she or any other employee had with Branch, *Five Star Transportation, Inc.,* 349 NLRB 42, 44-47 (2007) enfd. 522 F. 3d 46 (1st Cir. 2008). Further, any concerted activity engaged in by Minor is outweighed by the employer's right to maintain order and respect, *NLRB v. Thor Power Tool Company,* 351 F. 2d 584, 587 (7th Cir. 1965), *Southwestern Bell Telephone Company,* 200 NLRB 667, 700 (1972).

Minor's alleged protected activity other than the text messages

Aside from the text messages and Minor's related conversation with employees afterwards, the only arguable protected activity she engaged in was discussing salaries. According to Minor, she only discussed her own salary in the context of how happy she was to be being paid $17 an hour. According to Respondent, Minor, while assisting in the preparation of Respondent's payroll, discussed Frasier's salary without Frasier's permission. Either way, I find Minor did not engage in any protected concerted activity. In neither version was her conversation seeking to initiate, induce or prepare for group action.

Moreover, Minor's disclosure of another employee's wage rate, which she gained access to while performing her official duties in preparing Respondent's payroll is not protected, *Ashville School, Inc.,* 347 NLRB 877, fn. 1 (2006); *Clinton Corn Processing Company,* 253 NLRB 622 (1980). The facts in *Ashville School* are quite similar to the instant case. The alleged discriminatee was Respondent's payroll accountant. She disclosed wage and salary information to other employees that she possessed by virtue of her official position. The Board held that the employer did not violate the Act in terminating her for disclosing this information.[15]

Respondent's disciplinary documentation notice regarding Minor states as a reason for her discharge, "gossip and misinformation regarding Ekhaya employees/Supervisors' professional abilities, salaries, and personal lives, including but not limited to a belief of underserved promotions, accusations of mistreatment of an employee based on personal

[15] Although the Board stated the Ashville's payroll accountant knew the confidential nature of the information she disclosed, I do not think the absence of such evidence in this case regarding Minor makes the case materially distinguishable.

like/dislikes…" Respondent's investigation and the documentation for the discharges confuse the issues in this case. The record is very clear that Minor and Davis were terminated in response to Branch, and then Harris, learning about the text messages of June 18 and Minor's conversations about their personal lives immediately afterwards. I find that Minor did not engage in any protected activity and there is no indication that Respondent believed that she did so. Further, I find that Respondent did not terminate Minor or Davis in retaliation for any protected activity.

Allegedly illegal rules

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

In *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB,* 335 F. 3d 1079 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB 1318 (2001) regarding a rule prohibiting "disrespectful conduct." In *Lutheran Heritage,* the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

In assessing the rules alleged herein to violate the Act, the only issue is whether they would reasonably be construed to prohibit Section 7 activity. None of these rules explicitly prohibit Section 7 activity and none were promulgated in response to protected activity or have been applied to restrict the exercise of Section 7 rights.

With regard to these rules I find that following violate Section 8(a)(1):

The rule prohibiting "boisterous or disruptive activity in the workplace." "Disruptive" in particular would reasonably be read to encompass concerted activity aimed at changing wages, hours and/or other working conditions.

The rule prohibiting inappropriate familiarity among staff members. In the absence of clarification this would reasonably inhibit employees from discussing wages, hours and other terms and conditions of employment.

The rule prohibiting the disclosure of personal information. This would reasonably inhibit employees from discussing wages, hours and working conditions in light of the separate prohibition requiring employees to protect the privacy of other staff.

Particularly given the nature of Respondent's business, I find that none of the other allegedly illegal rules violate the Act. The rule requiring the protection of personal and confidential information regarding the company's system, employees, and youth and families

appears quite reasonable since Ekhaya staff may have access to such information about its clients and employees. As to the latter, Respondent employs individuals with prior felony convictions.

The General Counsel's citation to Vanshawn Branch's testimony at page 85 of the transcript is taken out of context. At this point Branch was referring to disclosure by an employee acting in his or her official capacity, not employees discussing their wages voluntarily. There is nothing violative about prohibiting an employee, while engaging in their official duties, from disclosing an employee's wage rate to other employees, without the consent of the employee whose wage rate is being disseminated, *Ashville Schools, supra*.

Vanshawn Branch gave a perfectly legitimate reason for requiring all correspondence to be copied to him; i.e., so that he can be assured that assigned tasks are completed. There would be no reason for employees to believe that this rule was initiated to inhibit protected conduct, or that it would do so. This is so because employees were told upon being hired that all their emails would be accessible by management. In this vein, I would note that all employees of the National Labor Relations Board are informed daily that they have no expectation of privacy regarding use of their government computer. When it comes to government work performed on government computers, or Ekhaya work performed on Ekhaya computers, Orwell's Big Brother is watching. He does not violate the Act by doing so.

It is difficult to see also how the requirement that all company business be performed via company email violates the Act. Ekhaya is regulated by a state of Louisiana entity, the Office of Behavioral Health. It thus appears imperative that all Ekhaya business be on its computers for inspection by that agency. In this vein, I note the Federal Records Act was amended in 2014 as follows:

> An officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee—
>
> (1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or
>
> (2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.

I find that Respondent does not violate the Act by requiring all company business to be performed on the company server or maintaining access to all emails on that server. Although cited by both parties, I conclude that *Purple Communications,* 361 NLRB No. 126 (2014) has no relevance to the instant case. An employer which allows employees to use its email system for Section 7 purposes is not required to accord privacy to such uses.

Summary of Conclusions of Law

Respondent violated Section 8(a)(1) of the Act by maintaining overly broad rules prohibiting, "boisterous and disruptive conduct," inappropriate familiarity among staff members and prohibiting the disclosure of personal information.

Respondent violated Section 8(a)(1) by sending termination letters to Nicholas Davis and Dalanta Zipporah Minor which could be reasonably read as suggesting that they were terminated due to gossip and misinformation about employees/supervisors' salaries, discussing the work abilities of supervisors, discussing the work abilities of fellow employees, discussing whether employees should receive promotions and mistreatment of an employee.

Respondent did not violate the Act in discharging Nicholas Davis and Dalanta Zipporah Minor.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

Order

The Respondent, Ekhaya Youth Project, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restricting the right of employees to discuss wages, hours and other terms and conditions of employment;

(b) Maintaining overly-broad rules that would reasonably be read to restrict the right of employees to discuss wages, hours and other terms and conditions of employment, including its rules that ambiguously bar "boisterous and disruptive" activity, "inappropriate familiarity among staff members" and the disclosure of personnel information.

(c) In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and/or revise Respondent's employee handbook and corporate compliance program so as to make it clear that employees are free to discuss wages, hours and other terms and conditions of employment.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at all its facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 15, 2016

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT restrict the right of employees to discuss wages, hours and other terms and conditions of employment.

WE WILL NOT Maintain overly-broad rules can be reasonably be interpreted to prohibit employees from discussing wages, hours and other terms and conditions of employment.

WE WILL NOT In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL rescind and/or revise our employee handbook and corporate compliance program so as to make it clear that employees are free to discuss wages, hours and other terms and conditions of employment.

EKHAYA YOUTH PROJECT, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3408
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15–CA–155131 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.